Commonwealth of Massachusetts
The Appeals Court

Suffolk County

No. 16-P-0804

D & H DISTRIBUTING COMPANY,

Plaintiff-Appellant,

– v–

COMMISSIONER OF REVENUE,

Defendant-Appellee.

ON APPEAL FROM A DECISION OF THE APPELLATE TAX BOARD

BRIEF FOR APPELLANT

PHILIP S. OLSEN
BBO NO. 378880
SARAH H. BEARD
BBO NO. 677592
PIERCE ATWOOD LLP
100 Summer Street, 22nd Floor
Boston, Massachusetts 02110
(617) 488-8113
polsen@pierceatwood.com
sbeard@pierceatwood.com

Attorneys for Appellant

Dated: August 26, 2016

COMMONWEALTH OF MASSACHUSETTS
THE APPEALS COURT

D & H DISTRIBUTING COMPANY, Plaintiff/Appellant	)	
v.	)	DOCKET NO. 2016-P-0804
COMMISSIONER OF REVENUE, Defendant/Appellee	)	

D & H DISTRIBUTING COMPANY'S
CORPORATE DISCLOSURE STATEMENT

Appellant, D & H Distributing Company, pursuant to Rule 1.21 of the Rules of the Supreme Judicial Court, hereby submits the following corporate disclosure:

D & H Distributing Company has no corporate parent and no publically held corporation owns more than ten percent (10%) of the stock of D & H Distributing Company.

D & H DISTRIBUTING COMPANY
By its attorneys,

Philip S. Olsen (BBO No. 378880)
Sarah H. Beard (BBO No. 677592)
Pierce Atwood LLP
100 Summer Street, 22nd Floor
Boston, MA 02110
(617) 488-8113
polsen@pierceatwood.com
sbeard@pierceatwood.com

Dated: August 25, 2016

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INTRODUCTION

The Appellate Tax Board (the "Board") erred in issuing a decision in favor of the Commissioner of Revenue ("Commissioner") following D & H Distributing Company's ("D&H") appeal of the Commissioner's refusal to abate sales taxes assessed against D&H for the tax periods September 1, 2006 through March 31, 2009.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the Appellate Tax Board erred in determining that D&H bore the burden of proving that its wholesale customers were "vendor[s] not engaged in business in the Commonwealth" pursuant to G.L. c. 64H, § 1.

II. Whether the Appellate Tax Board erred in presuming or inferring that "vendor[s] [were] not engaged in business in the Commonwealth" pursuant to G.L. c. 64H, § 1.

III. Whether the Appellate Tax Board erred in ruling that G.L. c. 64H, § 8(a) created a presumption that the transactions at issue were sales at retail.

IV. Whether the Commissioner's interpretation of G.L. c. 64H, § 1 leads to an unreasonable result.

V. Whether deeming D&H to be a vendor and requiring it to collect sales tax on the transactions at issue violated the Commerce Clause of the United States Constitution.

STATEMENT OF THE CASE

A. Nature of the Case

This appeal involves the application of the Massachusetts "drop-shipment" rule which is set forth in G.L. c. 64H, § 1 under the definition of "sale at retail" and "retail sale", terms that are used interchangeably. Section 1 provides in relevant part that:

> When tangible personal property is physically delivered by . . . a former owner thereof . . . to the ultimate purchaser residing in or doing business in the commonwealth . . . pursuant to a retail sale made by a vendor **not engaged in business in the commonwealth**, the person making or effectuating the delivery shall be considered the vendor of that property . . . [and] the transaction shall be a retail sale in the commonwealth . . . (emphasis added)

Relying on this section the Commissioner deemed D&H, which was the wholesaler for the transactions at issue, to be the retail vendor of the property and responsible for collecting sales tax, because the actual vendors were "not engaged in business in the commonwealth" under Section 1.

Before the person delivering tangible personal property into Massachusetts can be charged with the duty to collect sales tax, it must first be established that the out-of-state vendor is not engaged in business in the commonwealth. Absent this condition precedent, no liability can attach to D&H. The Commissioner improperly imposed upon D&H the burden of proving that the out-of-state vendors were "not engaged in business in the commonwealth".

B. Prior Proceedings and Disposition Below

D&H was a registered vendor with the Commonwealth pursuant to G.L. c. 64H, § 7. It filed sales tax returns for the tax periods September 1, 2006 through March 31, 2009 (the "the tax periods at issue")because a small portion of D&H's business involved direct sales to consumers. A 62-95, T 30.[1] These sales are not at issue in this appeal. T 25-26.

On October 10, 2010, following an audit of D&H's sales tax returns, the Commissioner issued a Notice of Intention to Assess additional sales tax against D&H for the tax periods at issue. A 28.

[1] All references to "A" are to the Record Appendix and all references to "T" are to the hearing transcript, both submitted herewith.

On June 2, 2011, the Commissioner issued a Notice of Assessment to D&H assessing additional sales tax, interest, and penalties for the tax periods at issue in the amount of $525,024.17. A 35. On July 20, 2011, D&H timely filed a Form CA-6 Application for Abatement seeing abatement of the additionally assessed sales tax and penalties for the tax periods at issue. A 37.

On August 24, 2011, the Commissioner issued two Notices of Abatement Determination denying D&H's Abatement Application for the tax periods at issue. A 43, 45. On October 20, 2011, D&H filed a Petition under Formal Procedure with the Appellate Tax Board appealing the Commissioner's refusal to abate sales tax and penalties assessed for the tax periods at issue. A 47. The Board issued its Decision for the Commissioner on October 20, 2014 and its Findings of Fact and Report on April 4, 2016. A 4, 5.

C. Statement of the Facts

For all tax periods relevant to this appeal, D&H was a Pennsylvania based corporation that was a wholesale distributor of computer and consumer electronic products. T 21-22. D&H's customers were retail sellers of the products that they purchased

from D&H. T 21-22. Within any given calendar year, D&H had approximately 20,000 to 30,000 customers scattered throughout the country. T 24, 31. Each customer resold products purchased from D&H to consumers in various states. T 21-22. D&H itself did not manufacture any products. It purchased its products directly from the manufacturers. A 7, T 27-28. The transactions at issue are sales of products to Massachusetts consumers made by vendors who had purchased the products from D&H. A 7-8, 153. The Commissioner took the position that the vendors were not "engaged in business" in Massachusetts and called upon D&H to prove otherwise. A 148. The products were shipped into Massachusetts by D&H and, under the Massachusetts "drop shipment rule", D&H was deemed to be the vendor and therefore responsible for collecting and remitting sales tax. T 72-73.

The transaction at issue in this appeal were described by the Appellate Tax Board as follows:

"First, a Massachusetts consumer purchased a product from an out-of-state retailer. Second, the out-of-state retailer would purchase the product from D & H; third, the out-of-state retailer would direct that D & H package, label, and ship the products

directly to the Massachusetts consumers. These activities occurred at D & H's warehouses, which during the tax periods at issue were located throughout the United States but not in Massachusetts. D&H did not collect sales or use tax on the purchases at issue". A 7, 8.

The statute is clear in that before a wholesaler such as D&H can be deemed a vendor, there must be a ". . . a retail sale made by a vendor not engaged in business in the commonwealth. . .' G.L. c. 64H, § 1.

However, the Commissioner made no effort to determine whether the out-of-state vendors were "engaged in business in the Commonwealth" other than reviewing his own records to see whether the vendors had registered as vendors under G.L. c. 64H, § 7. T 105.

The Commissioner's auditor testified that the drop shipment rule could be invoked when a wholesaler, such as D&H, was "[s]elling to a customer . . . who is not registered to do business in the Commonwealth to bill or collect tax." T 72. He concluded that the out-of-state vendors were not engaged in business in the Commonwealth solely because they had not registered with the Commonwealth as vendors for sales

tax purposes. ("They were not registered with the Commonwealth, so apparently they had no activity in Massachusetts"). T 101.

Under the Commissioner's interpretation of the Massachusetts drop-shipment rule, the fact that out-of-state vendors were not registered to collect sales tax in Massachusetts allowed the Commissioner to infer or presume that said vendors were not engaged in business in the commonwealth. According to the Commissioner, the burden then was on D&H, as the wholesaler, to prove that the out-of-state vendors were actually "engaged in business in the commonwealth" or D&H would be deemed the vendor.

SUMMARY OF THE ARGUMENT

In general terms, a drop shipment arises when an out-of-state retailer, such as Amazon, sells its product to a customer in a state where the retailer does not have a taxable presence, or "nexus". The out-of-state retailer does not maintain inventories of goods and must purchase its products from a wholesaler. In this case, D&H is the wholesaler. The out-of-state retailer purchases the product from the wholesaler and then instructs the wholesaler to ship the product directly to the out-of-state retailer's

customer. T 33-34. The shipment is made by common carrier. T 42.

There are in effect two separate transactions involved in a typical drop-shipment. The first transaction is the sale from the wholesaler to the retailer. In Massachusetts, and in many states, this is a sale for resale that is non-taxable (unless the drop shipment rule is applied, as described below). See G. L. c. 64H, § 8.

The second transaction is the sale from the retailer to the consumer. If the retailer has a taxable presence in Massachusetts, this transaction is a taxable sale and the retailer must register as a vendor and collect sales tax from the consumer.

However, an out-of-state retailer without substantial nexus (a taxable presence) to the state is not required to collect sales tax in a drop-shipment transaction. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). When the retailer is located out-of-state, and makes a sale of tangible personal property that is not subject to sales tax to an in-state consumer, the use tax comes into play. *Morton Buildings, Inc. v. Commissioner of Revenue*, 43 Mass. App. Ct. 441, 442 (1997) ("The use tax is

complementary to the sales tax and bites when the sales tax does not").

Unfortunately for the state, the use tax is for the most part based on the honor system. While consumers are required to report and self-assess use tax on their purchases, few actually will do so. See G. L. c. 64I, § 3. The Commissioner utilizes an aggressive interpretation of the drop-shipment rule to address this potential loophole and revenue loss.

The Commissioner relies on the Massachusetts drop shipment rule in G.L. c. 64H, § 1 as authority to deem the wholesaler, as the "former owner" of the tangible personal property, to be the vendor of the property based on his assertion that the actual vendor, which is constitutionally protected from sales tax liability, is "not engaged in business in the commonwealth".

There are no Massachusetts cases specifically addressing the issue as to whether, or in what circumstances, the Massachusetts drop-shipment rule can validly be applied against a wholesaler that drop ships merchandise on behalf of its customer - an out-of-state retailer - to the ultimate consumer in Massachusetts.

As a condition precedent to imposing duty to collect sales tax on a wholesaler delivering tangible personal property into Massachusetts under the drop shipment rule, it must be first established that the vendor is not "engaged in business in the commonwealth", as that term is defined by statute. As will be explained later, the task of determining whether someone is "engaged in business in the commonwealth" is extremely subjective and difficult. The Commissioner of Revenue bore the burden of proof on this point and could not delegate this task to D&H. The Appellate Tax Board erred when it agreed with the Commissioner and held that D&H was required to prove that the out-of-state vendors were not engaged in business in the commonwealth. (Pp. 13-20).

In order to shift the burden of proof to D&H, the Commissioner in effect invoked an unauthorized presumption. The Commissioner inferred from a review of his records that out-of-state vendors, not registered as vendors for sales tax purposes in Massachusetts, were therefore not engaged in business in the commonwealth. From this point, according to the Commissioner, D&H was required to show that the vendors were indeed engaged in business in

Massachusetts or be liable for sales tax. (Pp. 14-27).

To the extent the statute may be ambiguous, it must be interpreted strictly against the Commissioner with all doubts resolved in favor of D&H. *Dennis v. Commissioner of Corps. & Taxation*, 340 Mass. 629 (1960). The Commissioner's interpretation and application of the Massachusetts drop-shipment rule is flawed and places an impossible burden on taxpayers. (Pp. 27-33).

Finally, the Commissioner's application of the statute violates the Commerce Clause because it discriminates against interstate commerce. In-state wholesalers are only deemed to be vendors if they sell to goods to out-of-state retailers not engaged in business in Massachusetts. (Pp. 33-38).

ARGUMENT

A. STANDARD OF REVIEW

The decision of the Board interpreting a statute "will not be reversed or modified if it is based on a correct application of the law and if it is based on substantial evidence." *Kennametal, Inc. v. Commissioner of Revenue*, 426 Mass. 39, 43 (1997),

cert. denied, 523 U.S. 1059 (1998). "We review questions of statutory interpretation de novo ... giving 'substantial deference to a reasonable interpretation of a statute by the administrative agency charged with its administration enforcement.'" *Attorney Gen. v. Commissioner of Ins.*, 450 Mass. 311, 319 (2008), quoting *Commerce Ins. Co. v. Commissioner of Ins.*, 447 Mass. 478, 481 (2006).

While Courts defer to a reasonable interpretation by the agency, "principles of deference, however, are not principles of abdication". *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgt. Bd.*, 421 Mass. 196, 211 (1995), and an incorrect interpretation of a statute by an administrative agency is not entitled to deference. *Id.*

The Court's determination must be made upon consideration of the entire record. *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 466 (1981), quoting *Cohen v. Board of Registration in Pharmacy*, 350 Mass. 246, 253 (1966). Where the Board's determination that certain facts were legally significant flowed from a flawed construction of the statutory term, the Court is "not limited to those facts found by the board to be dispositive."

Commissioner of Revenue v. Jafra Cosmetics, Inc., 433 Mass. 255, 259 (2001).

B. UNDER GENERAL LAWS CHAPTER 64H, SECTION 1, THE COMMISSIONER BORE THE BURDEN OF PROVING THAT OUT-OF-STATE RETAILERS WERE NOT ENGAGED IN BUSINESS IN THE COMMONWEALTH.

1. The Commissioner Was Required To Prove That The Out-Of-State Vendors Were Not Engaged In Business In The Commonwealth.

As the Board stated, the "primary issue in this appeal is the application of the definition of "sales at retail" or "retail sale" as provided in G.L. c. 64H, § 1. A 11. Section 1 provides in relevant part that:

> [w]hen tangible personal property is physically delivered by . . . a former owner thereof . . . to the ultimate purchaser residing in or doing business in the commonwealth . . . **pursuant to a retail sale made by a vendor not engaged in business in the commonwealth**, the person making or effectuating the delivery shall be considered the vendor of that property, the transaction shall be a retail sale in the commonwealth by the person and that person, if engaged in business in the commonwealth, shall include the retail selling price in its gross receipts, regardless of any contrary statutory or contractual terms concerning the passage of title . . . (emphasis added)

D&H is the "former owner" of the tangible property because it sold tangible personal property to out-of-state vendors (or retailers) for resale to Massachusetts consumers. A 156, T 98. D&H delivered

by common carrier the tangible personal property to the ultimate purchasers in Massachusetts pursuant to the retail sales made by the out-of-state vendors. A 41, 44, T 42. These points are not in dispute. T 25-26.

The issue in dispute centers on the application of the phrase "not engaged in business in the commonwealth".

The Board concluded that D&H failed to "refute the assertion that the out-of-state retailers were not doing business in Massachusetts . . ." A 12.

As a general rule, the burden of proving entitlement to abatement is on the taxpayer. *Staples v. Commissioner of Corps. and Taxation*, 305 Mass. 20, 26 (1940). The Board invoked this rule to allocate the burden of proof to D&H. It then concluded that D&H failed to prove that the Massachusetts drop shipment rule did not apply to the transactions at issue. A 14, 18. More specifically, that D&H failed to prove that its customers were not engaged in business in Massachusetts.

The Board's deference to this general rule was unwarranted and incorrect. In practice, the allocation of the burden of proof is not always as

clear as the Board so firmly stated. *Horvitz v. Commissioner of Revenue*, 51 Mass. App. Ct. 386, 391-392 (2001) (" The board may have been misled by a somewhat less than crystal clear treatment of burden of proof in prior tax cases . . . the allocation of the burden of proof where a taxpayer seeks relief from imposition of a tax has been far from uniform").

The Supreme Judicial Court has articulated general rules to assist in the determination of the burden of proof in tax cases.

As a basic premise, the "right to tax must be plainly conferred by the statute. It is not to be implied." *McCarthy v. Commissioner of Revenue*, 391 Mass. 630, 632-633 (1984), quoting *Cabot v. Commissioner of Corps. & Taxation,* 267 Mass. 338, 340 (1929). Furthermore, "[t]axing statutes are to be construed strictly against the taxing authority, and all doubts resolved in favor of the taxpayer". *Dennis v. Commissioner of Corps. & Taxation*, 340 Mass. 629, 631 (1960).

As previously stated, before a duty to collect sales tax can be imposed on D&H under G.L. c. 64H, § 1, it must be first established that the vendors were not engaged in business in the commonwealth. As this

section involves the imposition of tax against a wholesaler (D&H) by deeming it to be a vendor, the right to tax cannot arise by implication or inference. With this in mind, and construing the statutory language strictly against the taxing authority, the burden of proving that a third-party vendor is not engaged in business in the Commonwealth falls upon the Commissioner.

In *DiStefano v. Commissioner of Revenue*, 394 Mass. 315 (1985), the issue was whether industrial commissaries selling bulk foods to independent canteen truck drivers and cafeterias were "restaurants" selling "meals". If the answer was yes, they would not be entitled to a sales tax exemption under G.L. c. 64H,
§ 6(h). 394 Mass. at 325. The Supreme Judicial Court rejected the Commissioner's contention that the taxpayers bore the burden to prove exemption from the sales tax. The Court noted that the exemptions "are merely part of the statutory definition of the types of sales and uses of tangible personal property which are to be employed in measuring the excises and of those which are not so to be used." *Id.* at 325.

Confirming that the right to tax does not arise by implication, and that ambiguities in tax statutes are resolved in favor of taxpayers, the Supreme Judicial Court found that the taxpayers' sales of food products to canteen truck and cafeteria operators were not taxable under G. L. c. 64H, § 2, unless the Commissioner met the burden of proving that these sales fell within the definition of "meals" sold by "restaurants." 394 Mass. at 326.

Similarly, the transactions at issue in this appeal were not taxable unless the Commissioner demonstrated that they fell within the definition of "sale at retail" or "retail sale" under Section 1. To do so, the Commissioner had to prove that the out-of-state vendors were not engaged in business in Massachusetts.

2. The Commissioner Failed To Demonstrate That The Out-Of-State Retailers Were Not Engaged In Business In The Commonwealth.

G.L. c. 64H, § 1, required that the Commissioner make an initial determination that the out-of-state retailers were not "engaged in business in the commonwealth" before she could deem D&H to be a vendor under the Massachusetts drop shipment rule.

The term "[e]ngaged in business in the commonwealth," is also defined in G.L. c. 64H, § 1:

> "Engaged in business in the commonwealth", having a business location in the commonwealth; regularly or systematically soliciting orders for the sale of services to be performed within the commonwealth or for the sale of tangible personal property for delivery to destinations in the commonwealth; otherwise exploiting the retail sales market in the commonwealth through any means whatsoever, including, but not limited to, salesmen, solicitors or representatives in the commonwealth, catalogs or other solicitation materials sent through the mails or otherwise, billboards, advertising or solicitations in newspapers, magazines, radio or television broadcasts, computer networks or in any other communications medium; or regularly engaged in the delivery of property or the performance of services in the commonwealth.

The statute's description of activities that would result in a determination that an out-of-state vendor is "engaged in business in the commonwealth" is extremely broad. Any one of these factors would be sufficient to be considered "engaged in business in the commonwealth." While the Department has stated that the definition of "engaged in business in the commonwealth" will be enforced to the extent allowed under constitutional limitations, the definition itself contains no such limitation. See Technical Information Release 96-08. An out-of-state vendor is "engaged in business in the commonwealth" under the

statutory definition if it is "exploiting the retail sales market in the commonwealth through any means whatsoever" or even "advertising . . . in television broadcasts . . ." G.L. c. 64H, § 1. Such activities, however, would be protected under *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) which held that a taxpayer must have a physical presence in a state in order to require collection of sales or use tax for purchases made by in-state customers. *Id.* at 317. As a result, the vendor could not be required to register and collect tax even though it is "engaged in business in the commonwealth."

Despite the many factors that must be considered in determining whether one is "engaged in business in the commonwealth", the Commissioner's auditor testified that he only looked to whether the out-of-state retailers were registered as vendors for Massachusetts sales tax purposes under G.L. c. 64H, § 7.

Q. *What else did you do to determine that they [out-of-state retailers] weren't engaged in business in the Commonwealth.*

A. *Nothing.*

T 105.

The Commissioner made no effort to determine whether the out-of-state vendors were "engaged in business in the Commonwealth" other than reviewing his own records to see whether the vendors had registered as vendors under G.L. c. 64H, §7. The auditor stated that the drop shipment rule can be invoked when the wholesaler, such as D&H, is "[s]elling to a customer who has - who is not registered to do business in the Commonwealth to bill or collect tax." T 72. He concluded that the out-of-state vendors were not engaged in business in the commonwealth solely because they had not registered with the commonwealth as vendors. ("They were not registered with the Commonwealth, so apparently they had no activity in Massachusetts"). T 101.

There is no language in c. 64H, §1, equating a company's failure to register as a vendor with having no nexus to Massachusetts and especially no language equating the failure to register with not being "engaged in business" in Massachusetts.

Accordingly, the Commissioner misapplied the statute, failed to sustain his burden, and the decision of the Board should be reversed.

C. THE COMMISSIONER COULD NOT PRESUME OR INFER THAT VENDORS WERE NOT ENGAGED IN BUSINESS IN THE COMMONWEALTH PURSUANT TO G.L. C. 64H, § 1.

1. The Statute Contains No Presumption For The Commissioner To Infer That An Out-Of-State Retailer Is Not Engaged In Business In The Commonwealth Where It Does Not Register As A Sales Tax Vendor.

The Commissioner recognized the difficulty associated with determining if an out-of-state retailer was engaged in business in Massachusetts. The auditor testified that determining whether a company is engaged in business in the commonwealth is an extensive process where many different factors come into play. TR 96. One only has to review the language of G.L. c. 64H, § 1, defining "engaged in business in the commonwealth", to appreciate the challenge facing an auditor. However, in this case, the Commissioner made no effort to review the factors outlined in G.L. c. 64H, § 1.

Despite the acknowledged difficulty in making this determination, there is no presumption in the statute to assist the Commissioner and the Commissioner cannot infer that the vendors are not engaged in business in the commonwealth simply because they are not registered as sales tax vendors under

G.L. c. 64H, § 7. *Town Fair Tire Centers, Inc. v. Commissioner of Revenue*, 454 Mass. 601 (2009).

In *Town Fair Tires*, the Supreme Judicial Court ruled that a New Hampshire tire vendor was not required to collect Massachusetts use tax on sales that it made to Massachusetts residents at its New Hampshire stores. Town Fair Tire Centers ("Town Fair") was a Connecticut corporation that operated stores throughout New England, including eighteen stores in Massachusetts and three stores in New Hampshire. 454 Mass at 602-603. Town Fair's principal business was retail sale and installation of automobile tires. *Id.* at 602. Town Fair collected and remitted Massachusetts sales tax on tire sales at its Massachusetts stores, but it did not collect Massachusetts use tax in connection with the sale of tires at its stores outside Massachusetts such as New Hampshire.

The Court noted that Massachusetts law requires a vendor to collect Massachusetts use tax on the sale of tangible personal property "for storage, use or other consumption in the commonwealth." Id. at 605. Town Fair argued that a vendor's liability for use tax "does not arise in connection with an out-of-state

sale merely by virtue of the purchaser's intending to store, use or consume merchandise in Massachusetts." Town Fair further argued that use tax liability is imposed upon a vendor only if the property "were actually stored, used or consumed in Massachusetts." Id.

In finding for Town Fair, the Court refused to read a presumption into the statute that sales of property to Massachusetts residents warranted a conclusion that the property sold was in fact used by Massachusetts residents. The Court stated:

> There is no Massachusetts statutory presumption of use in the Commonwealth where personal property is sold to a Massachusetts resident outside the Commonwealth, even where the goods purchased out of State may be affixed to property registered in Massachusetts. **We will not recognize a presumption that the Legislature has not established.** See Gould v. Gould, 245 U.S. 151, 153, 38 S. Ct. 53, 62 L. Ed. 211 (1917) ("In the interpretation of statutes levying taxes it is the established rule not . . . to enlarge their operations so as to embrace matters not specifically pointed out"); 3A N.J. Singer, Sutherland Statutory Construction § 66:3, at 35-36 (rev. 6th ed. 2003) (revenue legislation should not be construed "to add what is not found in the statute"). Id. at 698-609. (emphasis added)

Furthermore, in rejecting the Commissioner's argument that Town Fair did not rebut the "presumption" that the tires were used in

Massachusetts, the Court placed the burden upon the Commissioner to prove that the tires Town Fair sold to Massachusetts residents were in fact actually used in the Commonwealth. Id. at 609, footnote 20.

As the Court held in *Town Fair Tires*, the Commissioner cannot infer a presumption into a statute. The statutory provision at issue in this appeal does not create a presumption that vendors are not engaged in business in the commonwealth if they do not register with the Commonwealth pursuant to G.L. c. 64H, §7.

Moreover, the Commissioner cannot require a third party distributor to prove that vendors are engaged in business in the Commonwealth. The burden is on the Commissioner to prove that each vendor for whom D&H delivered property into the state was "not engaged in business in the commonwealth" before the Commissioner can deem D&H to be a vendor and assess a sales tax.

In order to apply the statute against D&H, and deem that D&H was a vendor, the Commissioner had to rely on a presumption, or inference, that was not created or authorized by the Legislature. That is, from the fact that the out-of-state vendor was not registered as a sales tax vendor in Massachusetts the

Commissioner inferred or presumed that said vendor was not engaged in business in the commonwealth.

As in the *Town Fair Tire* case, it was error on the part of the Commissioner to rely on a presumption that is not contained in the language of the statute as written.

The only way the Commissioner could conclude that the vendors were not engaged in business in Massachusetts was to presume that fact based on the vendors failure to register for sales tax in Massachusetts. The Court should reject the Commissioner's attempts to add language to a statute that the Legislature did not include.

2. G.L. c. 64H, § 8(a) Is Inapplicable And Does Not Create A Presumption Of Taxability For D&H.

In further support of its Decision, the Board stated that G.L. c. 64H, § 8(a) created a presumption that all of D&H's gross receipts were sales subject to tax unless it could prove otherwise. A 14. Section 8(a) states in part that "[i]t shall be presumed that all gross receipts of a vendor from the sale of services or tangible personal property are from sales subject to tax until the contrary is established".

Basically, section 8(a) creates a rebuttable presumption that all of a vendor's gross receipts from the sale of tangible personal property are sales at retail and subject to tax. The presumption may be rebutted if the vendor either produces a resale certificate or demonstrates that the sales are for resale. See *International Business Machines v. Commissioner of Revenue*, Appellate Tax Board Docket Nos. 170420-170426 (1997)(Computer manufacturer's business practice evidence insufficient to prove sales not taxable in absence of resale certificates).

This section is inapplicable because D&H, for the reasons articulated herein, was not a "vendor" within the meaning of § 1 and with respect to the transactions at issue.

Under G.L. c. 64H, § 1, D&H can only be considered the "vendor" if it delivered tangible personal property to a purchaser in Massachusetts pursuant to a retail sale made by a vendor not engaged in business in Massachusetts.

Section 8(a) does not come into play unless it has already been determined that the person selling tangible personal property is a "vendor". The Board erred when it first presumed that D&H was a vendor and then referenced

the § 8(a) presumption to support its Decision.

Moreover, if § 8(a) was applicable, then the sales at issue would not be taxable because it is not disputed that all sales by D&H to its customers were for resale to Massachusetts consumers. A 153. Section 8(a) presumes a sale is at retail unless a resale certificate is produced by the purchaser. Otherwise, "[t]he burden of proving that a sale of . . . tangible personal property by any vendor is not a sale at retail shall be upon such vendor . . ." Since the drop shipment rule is based on the two-transaction premise, all transactions at issue are admittedly sales for resale. The Board cannot carve out a portion of § 8(a) to validate its Decision and then ignore the remaining language contained in the section.

D. THE COMMISSIONER'S INTERPRETATION OF G.L. C. 64H, § 1, LEADS TO AN UNREASONABLE RESULT.

1. Even If D&H Were Deemed To Be A Vendor, It Would Be Unable To Fulfill The Requirements Of G.L. C. 64H, § 1.

If this Court determines that the statute was in any way ambiguous, then it would have to be "construed strictly against the Commissioner" ... with "all doubts resolved in favor of the taxpayer". *Dennis v.*

Commissioner of Corps. & Taxation, 340 Mass. 629, 631 (1960).

Assuming for the sake of argument that D&H could be deemed to be a vendor, it would not be able to fulfill the requirements of the statute.

D&H does not know the retail selling prices of products sold to the Massachusetts consumers. T 43. G.L. c. 64 H, § 1 requires deemed vendors to include the retail selling price (of the tangible personal property) in its gross receipts. (emphasis added).

However, D&H has no contact or relationship with the consumer to allow it to ascertain the retail selling price. T 43. As explained above, the drop shipment rule involves two separate transactions. The first is the sale from the wholesaler to the retailer and the second sale is the sale from the retailer to the consumer. D&H sells to the retailer (out-of-state vendor).

It has no knowledge of the terms of the sale between the out-of-state vendor and the consumer. Its only role is to deliver the property to the consumer on behalf of the out-of-state vendor. D&H does not bill the end user; does not know the retail sales price charged the consumer; does not see the invoice;

and does not know if the out-of-state vendor charged sales tax on the purchase. T 43 - 44.

Rather than acknowledge or address this deficiency in the application of the statute, the Board said the contention was "irrelevant" and curiously commented that D&H benefited from the error. "The Commissioner seems to concede that the assessment at issue was erroneously based on the wholesale prices of the products shipped rather than the retail prices. However, this error resulted in an understatement of the appellant's liability". A 16. The Board's cavalier dismissal of a statutory requirement demonstrates that it did not have a solid grasp of the issues presented in this appeal.

2. The Board's Decision Places An Impossible Burden on D&H.

An ambiguous statute must be interpreted to (1) avoid absurd or unreasonable results and (2) give effect to the Legislature's intent. See *Kimberly-Clark Corporation v. Commissioner of Revenue,* 83 Mass. App. Ct. 65, 74 (2013).

In order for D&H to be deemed a vendor, the out-of-state retailers could not be "engaged in business in the commonwealth," as defined in G.L. c. 64H, § 1.

According to § 1, this would require proof that the out-of-state retailer:

1. Did not have a business location in the commonwealth;

2. Did not regularly or systematically solicit orders for the sale of services to be performed within the commonwealth or for the sale of tangible personal property for delivery to destinations in the commonwealth;

3. Did not exploit the retail sales market in the commonwealth through any means whatsoever, including, but not limited to;

   (a) salesmen, solicitors or representatives in the commonwealth, catalogs or other solicitation materials sent through the mails or otherwise,

   (b) billboards, advertising or solicitations in newspapers, magazines, radio or television broadcasts, computer networks or in any other communications medium;

4. Did not regularly engage in the delivery of property or the performance of services in the commonwealth.

What makes the Board's interpretation more unreasonable is that during the periods at issue, D&H had approximately 20,000 - 30,000 customers per year. T 24. To comply with the statute, D&H would have to independently determine whether each and every customer was engaged in business in Massachusetts.

Moreover, by shifting the burden of proof to D&H, the Board in effect concluded that the thousands of out-of-state retailers were not engaged in business in

Massachusetts, and that it was up to D&H to prove otherwise.

3. The Board's Interpretation Ignores The Application Of The Use Tax.

As a complement to the sales tax, Massachusetts imposes a use tax on the storage, use or other consumption in Massachusetts of tangible personal property or services. See G.L. c. 64I § 2. The use tax ensures that Massachusetts vendors, who must collect sales tax on Massachusetts sales, are not placed at a competitive disadvantage to foreign vendors selling goods to Massachusetts customers.

If an out-of-state vendor has not collected the applicable sales or use tax on the sale of tangible personal property, the purchaser using such property in Massachusetts owes use tax on the storage, use or consumption of tangible personal property in Massachusetts and must file a use tax return with the Commissioner and pay the tax imposed. G.L. c. 64I, §§ 2, 3; G.L. c. 62C, § 16.

The use tax was put in place to cover situations where goods are brought into state, or delivered to consumers in Massachusetts by vendors not engaged in business in Massachusetts. As the Supreme Judicial

Court stated in *Town Fair Tire Centers, Inc. v. Commissioner of Revenue,* supra, the use tax and the sales tax "are complementary components of our tax system, created to 'reach all transactions, except those expressly exempted, in which tangible personal property is sold inside or outside the Commonwealth for storage, use, or other consumption within the Commonwealth.' " *Id.* at 605, *Commissioner of Revenue v. J. C. Penney, Co.,* 431 Mass. 684, 687 (2000), quoting *M & T Charters, Inc. v. Commissioner of Revenue,* 404 Mass. 137, 140 (1989).

It is the obligation of the in-state consumer to self-assess and remit use tax to the Commonwealth when the property purchased is being used in Massachusetts and was not subject to sales tax upon the original sale. G.L. c. 64I, § 3 ("Every person storing, using or otherwise consuming in the commonwealth tangible personal property or services purchased from a vendor shall be liable for the tax imposed by this chapter"). It should not be D&H's obligation to collect and remit a sales tax when the responsibility for remitting the corresponding use tax lies with the in-state consumer.

The majority of purchasers subject to use tax will likely not self-report the tax due and it is difficult,

if not impossible, for the Commissioner to efficiently administer the use tax with respect to consumer sales. See *Town Fair Tires, supra.*

However, the Commissioner cannot wield the Massachusetts drop shipment rule in a manner that puts an impossible burden on the wholesaler as a means of closing this enforcement loophole or to address a perceived revenue loss.

E. THE MASSACHUSETTS DROP SHIPMENT RULE DISCRIMINATES AGAINST INTERSTATE COMMERCE.

The United States Constitution limits a state's power to tax interstate commerce. The "dormant" commerce clause, implied by article I, section 8, clause 3, prohibits a state from discriminating against or unduly burdening interstate commerce. *Quill Corp. v. North Dakota*, 504 U.S. 298, 301, 312 (1992); *Opinion of the Justices*, 428 Mass. 1201, 1203-1204 (1998).

Yet a state may tax interstate commerce if the tax (1) applies to an activity having a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

In assessing whether a particular statutory provision violates the dormant commerce clause, a preliminary question is whether that provision "has a sufficient effect on interstate commerce to evoke commerce clause scrutiny." *Perini Corp. v. Commissioner of Revenue*, 419 Mass. 763,766 (1995), citing *Arenson v. Commonwealth*, 401 Mass. 244, 248 (1995). The Commissioner relies upon G.L. c. 64H, § 1 as authority to tax the transactions at issue.

Section 1 is invoked upon the delivery of tangible personal property on behalf of a vendor not engaged in business in the commonwealth. In this case, the Commissioner is targeting interstate deliveries of tangible personal property and deeming D&H liable for sales tax when the seller is an out-of-state, rather than in-state vendor. The Supreme Court has held that such inhibitions on interstate transportation clearly affect interstate commerce and are impermissible under the commerce clause. See *Camps Newfound/Owatonna, Inc., v. Harrison*, 520 U.S. 564, 573 (1997). ("... the transportation of persons across state lines... has long been recognized as a form of 'commerce'").

As the Appellate Tax Board has noted, "the crucial factor in a Dormant Commerce Clause analysis is whether

the differential treatment is imposed, not simply on an out-of-state taxpayer, but on interstate commerce, which entails the movement of goods and services". *Random House, Inc. v. Commissioner of Revenue*, Appellate Tax Board Docket No. C303502 (October 2, 2012). In this instance, the differential treatment applies when goods are delivered into Massachusetts on behalf of out-of-state vendors. Deliveries made on behalf of in-state vendors do not invoke the drop shipment rule.

The Massachusetts drop shipment statute is invalid under prong 3 of the *Complete Auto* test because it facially discriminates against interstate commerce. It imposes a tax upon an in-state third party distributor only when tangible personal property is delivered by an out-of-state vendor that is not engaged in business in the commonwealth.

An in-state third party distributor is not subject to the drop shipment sales tax if the sale is made to a vendor who is engaged in business in the commonwealth, but is subject to the tax if the exact same sale is made to an out-of-state vendor not engaged in business in the commonwealth. This disparity is discriminatory because it penalizes an in-state third party

distributor for doing business with an out-of-state vendor rather than with an in-state vendor.

Furthermore, an out-of-state vendor may choose not to do business with an in-state distributor because the tax imposed upon the in-state distributor by the drop shipment rule would at some point likely be passed on to the out-of-state vendor.

Having an in-state distributor incur sales tax obligations only if it sells products to out-of-state vendors that are not engaged in business in the commonwealth creates a potential interference with commerce for out-of-state vendors. An in-state third party distributor may stop selling products to out-of-state vendors because it does not want to bear the responsibility a) making the difficult determination whether or not the out-of-state vendor is "engaged in business" in the Commonwealth (i.e., is undertaking any of the activities constituting "engaged in business" as defined in Section 1, b) collecting information from the out-of-state vendor regarding the retail sales price that the vendor may hesitate to share, c) collecting and remitting the sales tax, and d) potential penalties and even "responsible person" liability for officers and others charged with tax

compliance if the determination whether the vendor is "engaged in business" is not correct. G.L. c. 62C, § 31A; G.L. c. 64H, § 16.

The Commerce Clause prohibits a state's tax scheme from imposing a higher burden on interstate commerce than on intrastate commerce. The Massachusetts drop shipment rule inevitably results in a higher burden on interstate transactions. In *Comptroller of the Treasury of Md. v. Wynne,* 135 S. Ct. 1787 (2015), the Supreme Court invalidated a Maryland tax that discriminated against Maryland residents that made interstate investments in favor of residents that made intrastate investments. Similarly, in this case transactions with out of state entities are subject to a higher burden.

Finally, an in-state third party distributor is at a competitive disadvantage in the Commonwealth because it is only allowed to provide a resale certificate from its customer (i.e., the vendor) if the vendor has a Massachusetts resale certificate. Massachusetts refuses to recognize certificates from out-of-state vendors. See G.L. c. 62C, § 8(d)(resale certificate must contain purchases Massachusetts sales tax registration number).

Even though the in-state distributor may have obtained a resale certificate issued to the vendor by another state, demonstrating that the sale is in fact a sale for resale, Massachusetts refuses to recognize out-of-state resale certificates. The effect of this practice is to discriminate against out-of-state vendors in favor of those vendors engaged in business in the commonwealth. By refusing to accept valid out-of-state resale certificates, and therefore refusing to acknowledge that such sales made to out-of-state vendors are likewise non-taxable sales for resale, Massachusetts further discriminates against interstate commerce by favoring vendors engaged in business in the commonwealth over vendors who are not. Therefore, the statute as written violates interstate commerce and should not be applied against D&H.

Conclusion

For the reasons set forth above, D&H respectfully requests that this Court reverse the Decision of the Appellate Tax Board and grant such other relief as this Court deems just and proper.

Respectfully submitted,
D & H DISTRIBUTING COMPANY
By its attorneys,

Philip S. Olsen (BBO No. 378880)
Sarah H. Beard (BBO No. 677592)
Pierce Atwood LLP
100 Summer Street, 22nd Floor
Boston, MA 02110
(617) 488-8113
polsen@pierceatwood.com
sbeard@pierceatwood.com

Dated: August 26, 2016

Rule 16(k) Certification of Compliance With Rules of Appellate Procedure

Counsel for Appellant D & H Distributing Company hereby certifies that the above Brief of the Appellant complies with the Rules of Appellate Procedure, including Rules 16, 18 and 20, that pertain to the filing of briefs.

Philip S. Olsen (BBO No. 378880)
Sarah H. Beard (BBO No. 677592)
Pierce Atwood LLP
100 Summer Street, 22nd Floor
Boston, MA 02110
(617) 488-8113
polsen@pierceatwood.com
sbeard@pierceatwood.com

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COMMONWEATLH OF MASSACHUSETTS

APPELLATE TAX BOARD

D & H DISTRIBUTING COMPANY **v.** **COMMISSIONER OF REVENUE**

Docket No. C314566

Promulgated:
April 4, 2016

This is an appeal under the formal procedure pursuant to G.L. c. 62C, § 39 and G.L. c. 58A, § 7, from the refusal of the Commissioner of Revenue ("Commissioner" or "appellee") to grant the appellant, D & H Distributing Company ("D & H" or "appellant"), abatement of sales and use taxes for the monthly periods beginning September 1, 2006 and ending March 31, 2009 ("periods at issue").

Commissioner Scharaffa heard the appeal and was joined by Chairman Hammond and Commissioners Rose, Chmielinski and Good in the decision for appellee.

These findings of fact and report are made at the requests of the appellant and the appellee pursuant to G.L. c. 58A, § 13 and 831 CMR 1.32.

Philip S. Olsen, Esq. and *Jennifer B. Green,* Esq. for the appellant.

Timothy R. Stille, Esq. and *Joseph J. Tierney,* Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of a Statement of Agreed Facts, and the testimony and exhibits introduced in the hearing of this appeal, the Appellate Tax Board ("Board") made the following findings of fact.

On October 6, 2011, after an audit of its sales and use tax returns for the periods at issue and various books and records including invoices, the Commissioner issued a Notice of Intent to Assess to the appellant. Upon its withdrawal of a conference request, on June 2, 2011 the Commissioner issued to the appellant a Notice of Assessment, informing the appellant of the Commissioner's assessment of additional taxes, interest, and penalties totaling $525,024.17 for the tax periods at issue. On July 20, 2011, D & H filed an abatement application, which the Commissioner denied on August 24, 2011. On October 20, 2011, D & H seasonably filed its petition with the Board. On the basis of the foregoing, the Board found and ruled that it had jurisdiction over the instant appeal.

The appellant presented its case-in-chief through the testimony of Ernest Meisel, Jr., the comptroller of D & H, and the submission of documents. The Commissioner presented her case-in-chief through the testimony of Robert Haberstroh, an auditor for the Massachusetts Department of

Revenue's multi-state tax group. Based on the evidence of record, the Board made the following findings of fact.

At all times relevant to this appeal, D & H was a wholesale distributor incorporated and headquartered in Pennsylvania with six warehouse distribution centers located throughout the United States. As a wholesale distributor, D & H sold various products (including computer products, educational products, home electronics, outdoor goods and sporting goods) to various retailers, primarily: (1) "big box stores," like Staples and Costco; (2) E-commerce companies, like walmart.com and target.com; (3) smaller, independent retail stores; and (4) educational and governmental institutions, like Harvard University bookstore. D & H did not manufacture its inventory but purchased it directly from various manufacturers.

D & H employed a sales representative who lived in Massachusetts and worked out of a home office. D & H considered this presence sufficient to create nexus in Massachusetts for sales and use tax purposes.

The transactions at issue in this appeal, herein referred to as "drop shipments," were generally structured as follows. First, a Massachusetts consumer purchased a product from an out-of-state retailer. Second, the out-of-state retailer would purchase the product from D & H;

third, the out-of-state retailer would direct that D & H package, label, and ship the products directly to the Massachusetts consumers. These activities occurred at D & H's warehouses, which during the tax periods at issue were located throughout the United States but not in Massachusetts. D & H did not collect sales or use tax on the purchases at issue.

A retailer purchased products from D & H in one of the following ways: through an online form available on D & H's website; by placing an order over the telephone; or by faxing a written order form to D & H. Prior to doing business with any retailer, D & H required that a retailer complete and submit a D & H Distributing Customer Application ("Application"). As part of this Application, all retailers were required to provide a list of all states in which they did business and copies of multistate and/or state-specific resale exemption certificates and license numbers. The Terms and Conditions of that Application, which was submitted into evidence, stated that the retailers "MUST furnish a resale certificate or be billed tax until the certificate is received." Moreover, the Application acknowledged that "Massachusetts require[s] a state issued form."

According to the Application, D & H's stated policy

was to charge sales tax on its sales to retailers who reported that they were doing business in Massachusetts but who did not provide D & H with a resale certificate. Mr. Meisel testified that D & H reported as taxable in Massachusetts only the sales of taxable products to companies with a Massachusetts billing address and only if the purchasing company did not provide D & H with a Massachusetts resale certificate.

The Commissioner conducted an audit of the appellant's books and records. According to the Commissioner's auditor, Mr. Haberstroh, the Commissioner's audit department reviewed D & H's monthly sales tax returns and then reconciled that information with D & H's sales reports and invoices, which included the following information: the retailer's address ("bill-to" address); the end-use customer's address ("ship-to" address); and the sales price that D & H charged to the retailer. From this information, the auditor identified transactions with a ship-to address in Massachusetts but a bill-to address outside of Massachusetts, a scenario that fit the fact pattern of a drop-shipment transaction. The auditor then removed from consideration those sales to retailers that were known to be engaged in business in Massachusetts (e.g.: Best Buy and Target) and then those sales to retailers that were

registered as Massachusetts vendors for sales tax purposes or that provided D & H a valid Massachusetts resale exemption certificate.

After the auditor provided to D & H a list of the purportedly taxable invoices, D & H was given the opportunity to support the non-taxable nature of any transaction that D & H asserted to be incorrectly classified as a taxable drop-shipment transaction. D & H provided Audit with several resale exemption certificates, some of which were sufficient to support the non-taxable nature of the receipts but some of which did not meet the requirements set out in G.L. c. 64H, § 8. On cross-examination, Mr. Haberstroh admitted that he made no further attempt to determine if a vendor was registered to do business in Massachusetts than the steps described above.

The appellant did not assert, nor advance evidence to prove, that the sales at issue were made to in-state vendors. Rather, the appellant's arguments center upon shifting the burden to the Commissioner to prove that the transactions were not made to in-state vendors. As will be explained in the Opinion, the Board found no error with the Commissioner's assessment of D & H under the facts presented. Therefore, the Board found and ruled that the

Commissioner's assessment against D & H was proper.

Accordingly, the Board issued a decision for the appellee in the instant appeal.

OPINION

Pursuant to G.L. c. 64H, § 2 as in effect during the periods at issue, Massachusetts sales tax is "imposed upon sales at retail in the Commonwealth, by any vendor, of tangible personal property . . . at the rate of 5.0%[1] of the gross receipts of the vendor from all such sales of such property or services, except as otherwise provided in this chapter." The primary issue in this appeal is the application of the definition of "sales at retail" or "retail sale" as provided in G.L. c. 64H, § 1:

> [w]hen tangible personal property is physically delivered by . . . a former owner . . . to the ultimate purchaser residing in . . . the commonwealth, . . . pursuant to a retail sale made by a vendor not engaged in business in the commonwealth, ***the person making or effectuating the delivery shall be considered the vendor of that property***, the transaction shall be a retail sale in the commonwealth . . . ***and that person, if engaged in business in the commonwealth, shall include the retail selling price in its gross receipts***, regardless of any contrary statutory or contractual terms concerning the passage of title . . . .
>
> (emphasis added)

[1] For sales occurring on and after August 1, 2009, after the periods at issue, the rate increased to 6.25%.

This passage, herein referred to as the "Drop Shipment Rule," describes the sales tax treatment of a "drop shipment," wherein an entity with sales/use tax nexus in Massachusetts sells taxable property to an out-of-state retailer and then delivers that property (or effectuates the delivery), at the direction of the out-of-state retailer, to the ultimate consumer located in Massachusetts. The Drop Shipment Rule essentially treats the wholesaler, the party that supplied the product and ultimately effectuated its delivery into Massachusetts, as the vendor who sold the products to the ultimate consumer, so that a sale to a Massachusetts consumer does not avoid the incidence of sales tax by the addition of multiple layers of retailers. G.L. c. 64H, § 1.

There are no material facts in dispute in this appeal. The appellant admits that it had Massachusetts sales/use tax nexus at all relevant times, and it provided no evidence to refute the assertion that the out-of-state retailers were not doing business in Massachusetts for purposes of the sales tax statute. The appellant, instead, contends that the assessment is invalid because, before the Drop Shipment Rule can be applied to a wholesaler, the Commissioner must make a preliminary determination that a retailer is not actually engaged in business in the

commonwealth. The burden, the appellant claims, must lie with the Commissioner, because if a statute is in any way ambiguous, then all doubts must be resolved in favor of the taxpayer. *See* ***DiStefano v. Commissioner of Revenue***, 394 Mass. 315, 326 (1985). The appellant claims that the Commissioner did not meet her burden simply by checking her own records to see if the retailers had registered to do business in the commonwealth because, under G.L c. 64H, § 1, "engaged in business in the commonwealth" provides an exhaustive list of qualifying activities, and the phrase must be interpreted as broadly as constitutionally permitted so as to give the wholesaler the greatest chance of avoiding taxation.

The appellant's argument misses the mark. First, the appellant fails to cite any ambiguity in the statute that would shift the burden to the Commissioner. An ambiguity refers to the existence of unclear language, but where the statute's language is plain, there is no ambiguity for the courts or the Board to interpret. *See* ***Massachusetts Broken Stone Co. v. Weston***, 430 Mass. 637, 640 (2000) ("Where the language of a statute is clear, courts must give effect to its plain and ordinary meaning and . . . need not look beyond the words of the statute itself."). The appellant did not establish that the burden of proof for purposes of

the Drop Shipment Rule should be anything other than the general rule that the burden is on the party "who claims to be aggrieved by the refusal of the Commissioner to abate a tax in whole or in part." ***Staples v. Commissioner of Corp. & Tax.***, 305 Mass. 20, 26 (1940). *See also* ***Commissioner of Corp. & Tax. v. Filoon***, 310 Mass. 374, 376 (1941); ***Stone v. State Tax Commission***, 363 Mass. 64, 65-66 (1973).

The appellant also ignores G.L. c. 64H, § 8(a) ("§ 8(a)"), which states the following:

> It shall be presumed that all gross receipts of a vendor from the sale of services or tangible personal property are from sales subject to tax until the contrary is established. ***The burden of proving that a sale of services or tangible personal property by any vendor is not a sale at retail shall be upon such vendor*** unless he takes from the purchaser a certificate to the effect that the service or property is purchased for resale, and such certificate is received and made available to the commissioner not later than sixty days from the date of notice from the commissioner to produce such certificate.

The above language creates a presumption that receipts generated by D & H for the sale of tangible personal property to Massachusetts consumers will be subject to Massachusetts sales tax unless D & H proves otherwise. Because the Drop Shipment Rule treats the wholesaler as a vendor for purposes of drop shipment transactions, DOR has consistently applied this unambiguous presumption to drop-

shipment transactions. *See* ***Letter Rulings 79-43, 80-76, 81-85, 84-26,*** and ***85-35.*** Therefore, consistent with § 8(a), the Commissioner does not have the burden to prove that the out-of-state retailers were not doing business in Massachusetts. Instead, the appellant has the burden to prove facts that would prevent application of the Drop Shipment Rule.

In addition, D & H possesses "readier access to the relevant information" than the Commissioner. *See* ***Raleigh v. Ill. Department of Revenue,*** 530 U.S. 15, 21 (2000). Here, D & H's Application requires the third-party retailers to submit to D & H their resale certificates before D & H will enter into any transactions with them. Therefore, not only does D & H have access to any resale certificates that it needs to refute the application of the Drop Shipment Rule, but it also has notice of which third-party retailers claim not to be doing business in Massachusetts.

The Board also disagreed with the appellant's reliance on ***Steelcase, Inc. v. Director, Div. of Taxation,*** 13 N.J. Tax 182 (1993) to argue that it could not calculate the sales tax due because it did not know the retail selling prices of the tangible personal property sold in Massachusetts. ***Steelcase*** is not applicable to the

appellant's situation, because, unlike Massachusetts, New Jersey had not adopted a Drop Shipment Rule. Moreover, the assessment at issue was based on the actual price paid by the retailer to D & H, not the retail selling price paid by the Massachusetts consumer for the items. Therefore, the appellant's contention is irrelevant under the facts of this appeal.[2]

D & H also claimed that, because the Massachusetts consumer has the obligation to report and remit a use tax on goods that it purchases from an out-of-state retailer, enforcement of the use tax and sales tax under the Drop Shipment Rule would result in double taxation of the same transaction. Again, the appellant's argument misses the mark. Under the Drop Shipment Rule, the wholesaler with Massachusetts nexus is treated as the vendor making a retail sale in the Commonwealth for sales tax purposes. Therefore, the transaction is subject to sales tax and is thus exempt from use tax. G.L c. 64I, § 7(a)(1).

Finally, contrary to the appellant's contention, the Drop Shipment Rule does not discriminate against interstate commerce. To violate the Commerce Clause, a tax must impose greater burdens on out-of-state goods, activities,

[2] The Commissioner seems to concede that the assessment at issue was erroneously based on the wholesale prices of products shipped into Massachusetts rather than the retail prices. However, this error resulted in an understatement of the appellant's liability.

or enterprises than on competing in-state goods, activities, or enterprises. *See* ***Oregon Waste Sys., Inc. v. Department of Envtl. Quality***, 511 U.S. 93, 99 (1994) ("[discrimination] simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"). D & H contends that a wholesaler with Massachusetts nexus is penalized for doing business with an out-of-state vendor as opposed to a vendor doing business in Massachusetts. However, this "elaborate argument" is merely a "house of cards," which "ignores the crucial fact that the same sales tax would be imposed on the transaction if it had happened entirely within [Massachusetts]." ***Lyon Metal Products v. Cal. State Bd. Of Equalization***, 58 Cal. App. 4th 906, 912 (1997). The only difference between these scenarios is the party responsible for collecting the tax, not whether the transaction is subject to tax at all. Moreover, "the same amount of tax would be imposed on the transaction if both wholesaler and retailer were outside the state, in the form of a use tax to be paid by the [Massachusetts] consumer-customer." ***Id.*** at 912-13. Because scenarios involving in-state and out-of-state vendors are equally subject to tax, there is no greater burden on the transaction using the out-of-state vendor and, therefore, no discrimination. *Contrast* ***Camps***

Newfound/Owatonna v. Harrison, 520 U.S. 564 (1997) (ruling that a property tax scheme violated the Commerce Clause when the tax was essentially charged to camps only with a large number of students from out of state).

Conclusion

The transactions at issue fit squarely within the Drop Shipment Rule. The appellant offered no evidence to refute the fact that the transactions were taxable under that rule. On the basis of the evidence submitted in this appeal, the Board found that the appellant had the burden of proving that the Drop Shipment Rule did not apply to the transactions at issue and it failed to satisfy that burden. Therefore, the Board found and ruled that the Commissioner's assessment was proper.

Accordingly, the Board issued a decision for the appellee.

THE APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy.

Attest: _____
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PART I ADMINISTRATION OF THE GOVERNMENT

TITLE IX TAXATION

CHAPTER 62C ADMINISTRATIVE PROVISIONS RELATIVE TO STATE TAXATION

Section 6 Persons required to make returns; fiduciaries; time for making

Section 6. (a) Every individual inhabitant of the commonwealth who receives or accrues during the taxable year Massachusetts gross income, as defined in section two of chapter sixty-two, in excess of eight thousand dollars shall make a return of such income.

Every nonresident, whose Massachusetts gross income, determined in accordance with section five A of chapter sixty-two, exceeds eight thousand dollars or the personal exemption to which he may be entitled under section three of chapter sixty-two, whichever is the lesser, and every partnership, association, or trust whose federal gross income, as defined in section one of chapter sixty-two, exceeds one hundred dollars, shall make a return of such income.

Every individual, not otherwise required to file a return under the foregoing provisions of this section, who is a resident for a portion of a twelve-month period beginning on the first day of a taxable year and a nonresident for a portion of the same twelve-month period and whose Massachusetts gross income, as defined in section two of chapter sixty-two, exceeds eight thousand dollars shall make separate returns as a resident and a nonresident of his income subject to taxation under chapter sixty-two.

A husband and wife may make a single return jointly of income taxes under chapter sixty-two, even though one of the spouses has neither income nor deductions, provided that their taxable years begin on the same day and either end on the same day or on different days solely because of the death of either or both. Such return shall be known as a joint return and shall include the income, exemptions and deductions of both spouses. Each spouse shall be jointly and severally liable for the entire tax.

(b) Every executor, administrator, trustee, guardian, conservator, trustee in bankruptcy, assignee for the benefit of creditors and receiver, other than a receiver of a business corporation, every fiduciary referred to in section twenty-five of chapter sixty-two and every other person receiving income taxable under chapter sixty-two which exceeds one hundred dollars, shall make an annual return of his taxable income. An executor or administrator shall file a return under this section if his decedent received any such amount not returned by the decedent as to which a tax under chapter sixty-two may still be assessed within the time limited by section twenty-six of this chapter. If a person has been appointed executor or administrator after January first in any year, the return of such income received by his

decedent but not reported by him shall be due and shall be filed on or before the fifteenth day of the fourth month after the date of such appointment. Every such fiduciary intending to make final distribution of an estate or trust before the end of any year shall file immediately prior to such distribution a return under this section of all such income received by him and by his decedent during said year and prior to such distribution, and the taxes thereon shall become due and payable forthwith.

(c) Except as otherwise provided, returns under this section shall be made on or before the fifteenth day of the fourth month following the close of each taxable year.

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PART I ADMINISTRATION OF THE GOVERNMENT

TITLE IX TAXATION

CHAPTER 62C ADMINISTRATIVE PROVISIONS RELATIVE TO STATE TAXATION

Section 31A Notice of unpaid corporate or partnership assessment; liability of individuals; abatement

Section 31A. If a person fails to pay to the commissioner any required tax of a corporation, partnership or limited liability company and the person is personally and individually liable therefore to the commonwealth under section 5 of chapter 62B, section 7D of chapter 64C, section 7B of chapter 64G, section 16 of chapter 64H section 17 of chapter 64I or section 6 of chapter 64L, the commissioner shall notify the person in writing at any time during the period of time that the assessment against the corporation, partnership or limited liability company remains in existence and unpaid. The person or his representative may confer with the commissioner or his duly authorized representative as to the assessment of the tax or the proposed determination that he is personally and individually liable therefore within 30 days after the date of such notification. After the expiration of 30 days from the date of the notification, the person shall be personally and individually liable for the tax of the corporation, partnership or limited liability company, which shall be considered to be assessed against the person, and a lien under section 50 upon all property and rights of property, whether real or personal, belonging to the person shall arise in favor of the commonwealth.

If such person is aggrieved by the assessment of the tax or the determination that he is personally and individually liable therefor, he may apply, in writing to the commissioner, on a form approved by him, for an abatement thereof at any time within the dates provided in section thirty-seven or within sixty days from the date of the notice under this section, whichever is later. All provisions of sections thirty-seven to thirty-nine, inclusive, shall apply to such application for abatement.

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PART I ADMINISTRATION OF THE GOVERNMENT

TITLE IX TAXATION

CHAPTER 64H TAX ON RETAIL SALES OF CERTAIN TANGIBLE PERSONAL PROPERTY

Section 1 Definitions

Section 1. As used in this chapter the following words shall have the following meanings:?

"Business", any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect.

"Commissioner", the commissioner of revenue.

"Engaged in business", commencing, conducting or continuing in business, as well as liquidating a business when the liquidator thereof holds himself out to the public as conducting such a business.

"Engaged in business in the commonwealth", having a business location in the commonwealth; regularly or systematically soliciting orders for the sale of services to be performed within the commonwealth or for the sale of tangible personal property for delivery to destinations in the commonwealth; otherwise exploiting the retail sales market in the commonwealth through any means whatsoever, including, but not limited to, salesmen, solicitors or representatives in the commonwealth, catalogs or other solicitation materials sent through the mails or otherwise, billboards, advertising or solicitations in newspapers, *magazines, radio or television broadcasts, computer networks or in any other* communications medium; or regularly engaged in the delivery of property or the performance of services in the commonwealth. A person shall be considered to have a business location in the commonwealth only if such person (i) owns or leases real property within the commonwealth; (ii) has one or more employees located in the commonwealth; (iii) regularly maintains a stock of tangible personal property in the commonwealth for sale in the ordinary course of business; or (iv) regularly leases out tangible personal property for use in the commonwealth. For the purposes of this paragraph, property on consignment in the hands of a consignee and offered for sale by the consignee on his own account shall not be considered as stock maintained by the consignor; a person having a business location in the commonwealth solely by reason of regularly leasing out tangible personal property shall be considered to have a business location in the commonwealth only with respect to such *leased property; and an employee shall be considered to be located in the commonwealth if* (a) his service is performed entirely within the commonwealth or (b) his service is performed both within and without the commonwealth but in the performance of his services he regularly

commences his activities at, and returns to, a place within the commonwealth. "Within the commonwealth" means within the exterior limits of the commonwealth of Massachusetts, and includes all territory within said limits owned by, or leased or ceded to, the United States of America.

"Gross receipts", the total sales price received by a vendor as a consideration for retail sales.

"Home service provider", the facilities-based carrier or reseller with which the retail customer contracts for the provision of mobile telecommunications service.

"Mobile telecommunications service", commercial mobile radio service, as defined in section 20.3 of title 47 of the Code of Federal Regulations as in effect on June 1, 1999.

[Definition of "Motion picture" applicable as provided by 2005, 158, Sec. 9 as amended by 2007, 63, Sec. 15.]

"Motion picture", a feature-length film, a video, a digital media project, a television series defined as a season not to exceed 27 episodes, or a commercial made in the commonwealth, in whole or in part, for theatrical or television viewing or as a television pilot. The term "motion picture" shall not include a production featuring news, current events, weather and financial market reports, talk show, game show, sporting events, awards show or other gala event, a production whose sole purpose is fundraising, a long-form production that primarily markets a product or service, or a production containing obscene material or performances.

[Definition of "Motion picture production company" applicable as provided by 2005, 158, Sec. 9 as amended by 2007, 63, Sec. 15.]

"Motion picture production company", a company including any subsidiaries engaged in the business of producing motion pictures, videos, television series, or commercials intended for a theatrical release or for television viewing. The term "motion picture production company" shall not mean or include any company which is more than 25 per cent owned, affiliated, or controlled, by any company or person which is in default on a loan made by the commonwealth or a loan guaranteed by the commonwealth.

"Person", an individual, partnership, trust or association, with or without transferable shares, joint-stock company, corporation, society, club, organization, institution, estate, receiver, trustee, assignee, or referee, and any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of individuals acting as a unit.

"Place of primary use", the street address representative of where the customer's use of the mobile telecommunications service primarily occurs, which shall be the residential street address or the primary business address of the customer and which shall be within the licensed service area of the home service provider. The place shall be determined in accordance with 4 U.S.C. sections 121 and 122.

"Prepaid calling arrangement", the right to exclusively purchase telecommunications services, that shall be paid for in advance and enables the origination of the calls using an access number or authorization code, whether manually or electronically dialed.

"Purchaser", a person who purchases tangible personal property or services the receipts from the retail sale of which are taxable under this chapter and includes a buyer, vendee, lessee, licensee, or grantee.

"Retailer", includes (i) every person engaged in the business of making sales at retail; (ii) every person engaged in the making of retail sales at auction of tangible personal property whether owned by such person or others; (iii) every person engaged in the business of making sales for storage, use or other consumption, or in the business of making sales at auction of tangible personal property whether owned by such person or others for storage, use or other consumption; (iv) every salesman, representative, peddler or canvasser who, in the opinion of the commissioner, it is necessary to regard for the efficient administration of this chapter as the agent of the dealer, distributor, supervisor or employer under whom he operates or from whom he obtains the tangible personal property sold by him, in which case the commissioner may treat and regard such agent as the retailer jointly responsible with his principal, employer or supervisor for the collection and payment of the tax imposed by this chapter; and (v) the commonwealth, or any political subdivision thereof, or their respective agencies when such entity is engaged in making sales at retail of a kind ordinarily made by private persons.

"Retail establishment", any premises in which the business of selling services or tangible personal property is conducted, or, in or from which any retail sales are made.

"Sale" and "selling" include (i) any transfer of title or possession, or both, exchange, barter, lease, rental, conditional or otherwise, of tangible personal property or the performance of services for a consideration, in any manner or by any means whatsoever; (ii) the producing, fabricating, processing, printing or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting; (iii) the furnishing and distributing of tangible personal property or services for a consideration by social clubs and fraternal organizations to their members or others; (iv) a transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price; (v) a transfer

for a consideration of the title or possession of tangible personal property which has been produced, fabricated or printed to the special order of the customer, or of any publication; (vi) the furnishing of information by printed, mimeographed or multigraphed matter, or by duplicating written or printed matter in any other manner, including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons, but excluding the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons, and excluding the services of advertising or other agents, or other persons acting in a representative capacity, and information services used by newspapers, radio broadcasters and television broadcasters in the collection and dissemination of news and excluding the furnishing of information by photocopy or other similar means by not for profit libraries which are recognized as exempt from taxation under ss50l(C)(3) of the Federal Internal Revenue Code; (vii) the performance of services for a consideration, excluding (a) services performed by an employee for his employer whether compensated by salary, commission, or otherwise, (b) services performed by a general partner for his partnership and compensated by the receipt of distributive shares of income or loss from the partnership; and (c) the performance of services for which the provider is compensated by means of an honorarium, or fee paid to any person or entity registered under 15 USC 80b?3 or 15 USC 78q?1 for services the performance of which require such registration, for services related thereto or for trust, custody, and related cash management and securities services of a trust company as defined in chapter one hundred and seventy-two.

"Sale at retail" or "retail sale", a sale of services or tangible personal property or both for any purpose other than resale in the regular course of business. When tangible personal property is physically delivered by an owner, a former owner thereof, a factor, or an agent or representative of the owner, former owner or factor, to the ultimate purchaser residing in or doing business in the commonwealth, or to any person for redelivery to the purchaser, pursuant to a retail sale made by a vendor not engaged in business in the commonwealth, the person making or effectuating the delivery shall be considered the vendor of that property, the transaction shall be a retail sale in the commonwealth by the person and that person, if engaged in business in the commonwealth, shall include the retail selling price in its gross receipts, regardless of any contrary statutory or contractual terms concerning the passage of title or risk of loss which may be expressly or impliedly applicable to any contract or other agreement or arrangement for the sale, transportation, shipment or delivery of that property. He shall include the retail selling price of the property in his gross receipts. The term "sale at retail" or "retail sale" shall not include (a) sales of tickets for admissions to places of amusement and sports; (b) sales of transportation services; (c) professional, insurance, or personal service transactions which involve no sale or which involve sales as inconsequential elements for which no separate charges are made; or (d) any sale in which the only transaction in the commonwealth is the mere execution of the contract of sale and in which

the tangible personal property sold is not in the commonwealth at the time of such execution; provided, however, that nothing contained in this definition shall be construed to be an exemption from the tax imposed under chapter sixty-four I. In the case of interstate telecommunication services other than mobile telecommunications services, the sale of such services shall be deemed a sale within the commonwealth if the telecommunication is either originated or received at a location in the commonwealth and the services are either paid for in the commonwealth or charged to a service address located in the commonwealth. In the case of interstate and intrastate mobile telecommunications services, the sale of such services shall be deemed to be provided by the customer's home service provider and shall be considered a sale within the commonwealth if the customer's place of primary use is located in the commonwealth. To prevent actual multi-state taxation of any sale of interstate telecommunication service subject to taxation under this chapter, any taxpayer, upon proof that the taxpayer has paid a tax in another state on such sale, shall be allowed a credit against the tax imposed by this chapter to the extent of the amount of such tax properly due and paid in such other state. However, such credit shall not exceed the tax imposed by this chapter. In the case of the sale or recharge of prepaid calling arrangements, the sale or recharge of such arrangements shall be deemed to be within the commonwealth if the transfer for consideration physically takes place at a retail establishment in the commonwealth. In the absence of such physical transfer for consideration at a retail establishment, the sale or recharge shall be deemed a retail sale within the commonwealth if the customer's shipping address is in the commonwealth or, if there is no item shipped, if the customer's billing address or the location associated with the customer's mobile telephone number, as applicable, is in the commonwealth. For purposes of collection of the tax imposed by this chapter on such sales, such sale shall be deemed to occur on the date that the bill is first issued by the vendor in the regular course of its business; provided, however, in the case of prepaid calling arrangements, the sale shall be deemed to occur on the date of the transfer for consideration. For purposes of reporting the sale or recharge of prepaid calling arrangements, the sale or recharge of the arrangements shall be considered a taxable sale of tangible personal property unless the vendor is otherwise required to report sales of telecommunications services.

"Sales price", the total amount paid by a purchaser to a vendor as consideration for a retail sale, valued in money or otherwise. In determining the sales price, the following shall apply: (a) no deduction shall be taken on account of (i) the cost of property sold; (ii) the cost of materials used, labor or service cost, interest charges, losses or other expenses; (iii) the cost of transportation of the property prior to its sale at retail; (b) there shall be included (i) any amount paid for any services that are a part of the sale; and (ii) any amount for which credit is given to the purchaser by the vendor; and (c) there shall be excluded (i) cash discounts allowed and taken on sales; (ii) the amount charged for property returned by purchasers to vendors upon rescission of contracts of sale when the entire amounts charged therefor, less

the vendors' established handling fees, if any, for such return of property, are refunded either in cash or credit, and when the property is returned within ninety days from the date of sale, and the entire sales tax paid is returned to the purchaser; provided, however, that where a motor vehicle is returned pursuant to a rescission of contract such motor vehicle must be returned within one hundred and eighty days of the date of sale; (iii) the amount charged for labor or services rendered in installing or applying the property sold; (iv) the amount of reimbursement of tax paid by the purchaser to the vendor under this chapter; (v) transportation charges separately stated, if the transportation occurs after the sale of the property is made; (vi) the amount of the manufacturers' excise tax levied upon motor vehicles under section 4061(a) of the Internal Revenue Code of 1954 of the United States, as amended; and (vii) a "service charge" or "tip" that is distributed by a vendor to service employees, wait staff employees or service bartenders as provided in section 152A of chapter 149.

"Services", a commodity consisting of activities engaged in by a person for another person for a consideration; provided, however, that the term "services" shall not include activities performed by a person who is not in a regular trade or business offering such person's services to the public, and shall not include services rendered to a member of an affiliated group, as defined by section 1504 of the Internal Revenue Code, by another member of the same affiliated group that does not sell to the public the type of service provided to its affiliate; and provided further, that the term services shall be limited to telecommunications services; and provided further, that nothing herein shall exempt from tax sales of tangible personal property subject to tax under this chapter.

"Tangible personal property", personal property of any nature consisting of any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the commonwealth, but shall not include rights and credits, insurance policies, bills of exchange, stocks and bonds and similar evidences of indebtedness or ownership. For purposes of this chapter, "tangible personal property" shall include gas, electricity and steam. A transfer of standardized computer software, including but not limited to electronic, telephonic, or similar transfer, shall also be considered a transfer of tangible personal property. The commissioner may, by regulation, provide rules for apportioning tax in those instances in which software is transferred for use in more than one state.

"Tax", the excise tax imposed by this chapter.

"Taxpayer", any person required to make returns or pay the tax imposed by this chapter.

"Telecommunications services", any transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiberoptics, laser, microwave, radio,

satellite or similar facilities but not including cable television. Telecommunications services shall be deemed to be services for purposes of this chapter and chapter sixty-four I.

"Use of a service", enjoyment of the benefit of a service.

"Vendor", a retailer or other person selling tangible personal property or services of a kind the gross receipts from the retail sale of which are required to be included in the measure of the tax imposed by this chapter.

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PART I ADMINISTRATION OF THE GOVERNMENT

TITLE IX TAXATION

CHAPTER 64H TAX ON RETAIL SALES OF CERTAIN TANGIBLE PERSONAL PROPERTY

Section 7 Registration required

Section 7. No person shall do business in this commonwealth as a vendor unless a registration shall have been issued to him for each place of business in accordance with section sixty-seven of chapter sixty-two C.

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PART I ADMINISTRATION OF THE GOVERNMENT

TITLE IX TAXATION

CHAPTER 64H TAX ON RETAIL SALES OF CERTAIN TANGIBLE PERSONAL PROPERTY

Section 8 Presumption of sale at retail; burden of proof; resale and exempt use certificates

Section 8. (a) It shall be presumed that all gross receipts of a vendor from the sale of services or tangible personal property are from sales subject to tax until the contrary is established. The burden of proving that a sale of services or tangible personal property by any vendor is not a sale at retail shall be upon such vendor unless he takes from the purchaser a certificate to the effect that the service or property is purchased for resale, and such certificate is received and made available to the commissioner not later than sixty days from the date of notice from the commissioner to produce such certificate. Where a certificate is received within the foregoing time limit but is deficient in some material manner and where such deficiency is thereafter removed, also within the sixty day period, the receipt of such certificate shall be deemed to have satisfied the foregoing time requirement.

(b) The certificate shall relieve the vendor from the burden of proof only if taken in good faith from a person who is engaged in the business of selling services or tangible personal property of the same kind as the services or property sold and who holds the registration as provided for in section seven and who, at the time of purchasing the service or tangible personal property, intends to sell the service or property in a sale at retail in the regular course of business or is unable to ascertain at the time of purchase whether the service or property will be sold or will be used for some other purpose.

(c) The certificate shall be signed by and bear the name and address of the purchaser and the number of his registration, and shall indicate the general character of the service or tangible personal property sold by the purchaser in the regular course of business. The certificate shall be in such form as the commissioner may prescribe.

(d) If a purchaser who gives a certificate makes any use of the service or property other than retention, demonstration or display while holding it for sale in the regular course of business, the use shall be deemed a retail sale by the purchaser as of the time the service or property is first used by him, and the cost of the service or property to him shall be deemed the gross receipts from such retail sale. If the sole use of the property other than retention, demonstration or display in the regular course of business is the rental of the property while holding it for sale, the purchaser may elect to include in his gross receipts the amount of the rental charge rather than the cost of the property to him.

(e) If the tangible personal property is purchased by a person who will use the property in a manner which exempts it from the tax imposed by this chapter, he may give an exempt use certificate to the vendor, certifying that the property being purchased will be so used. The burden of proving that a sale of tangible personal property by any vendor is exempt under this chapter shall be upon such vendor unless he takes from the purchaser a certificate to the effect that the property will be used in an exempt manner.

(f) The exempt use certificate shall relieve the vendor from the burden of proof only if taken in good faith for the purchase of property from a person who is engaged in an activity described in paragraph (r) or (s) of section six, and who, at the time of purchasing the tangible personal property, intends to use the property in an exempt manner or is unable to ascertain at the time of purchase whether the property will be used in an exempt manner or will be used for some other purpose, and such certificate is received and made available to the commissioner not later than sixty days from the date of notice from the commissioner to produce such certificate. Where a certificate is received within the foregoing time limit but is deficient in some material manner, and where such deficiency is thereafter removed, also within the sixty day limit, the receipt of such certificate shall be deemed to have satisfied the foregoing time requirement.

(g) The exempt use certificate shall be signed by and bear the name and address of the purchaser and the number of his registration, if any, give a description of the property being purchased, certify the exempt use to which the property will be applied and be in such form as the commissioner may prescribe.

(h) If a purchaser who gives an exempt use certificate makes any use of the property other than the one therein certified, the use shall be deemed a retail sale by the purchaser as of the time the property is first so used and the cost of the property to him shall be deemed the gross receipts from such retail sale.

(i) The commissioner may promulgate regulations determining which services shall be deemed purchased for resale under this section, containing provisions for the issuance of certificates to the effect that services are purchased for resale.

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PART I ADMINISTRATION OF THE GOVERNMENT

TITLE IX TAXATION

CHAPTER 64H TAX ON RETAIL SALES OF CERTAIN TANGIBLE PERSONAL PROPERTY

Section 16 Liability for failure to pay tax

Section 16. Every person who fails to pay to the commissioner any sums required by this chapter shall be personally and individually liable therefor to the commonwealth. The term "person", as used in this section, includes an officer or employee of a corporation, or a member or employee of a partnership or limited liability company, who as such officer, employee or member is under a duty to pay over the taxes imposed by this chapter.

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PART I ADMINISTRATION OF THE GOVERNMENT

TITLE IX TAXATION

CHAPTER 64I TAX ON THE STORAGE, USE OR OTHER CONSUMPTION OF CERTAIN TANGIBLE PERSONAL PROPERTY

Section 2 Imposition; rate; payment

Section 2. Except as otherwise provided in this chapter an excise is hereby imposed upon the storage, use or other consumption in the commonwealth of tangible personal property or services purchased from any vendor or manufactured, fabricated or assembled from materials acquired either within or outside the commonwealth for storage, use or other consumption within the commonwealth at the rate of 6.25 per cent of the sales price of the property or services. The excise shall be paid by the taxpayer to the commissioner at the time provided for filing the returns required by section sixteen of chapter sixty-two C.

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CHAPTER 64I TAX ON THE STORAGE, USE OR OTHER CONSUMPTION OF CERTAIN TANGIBLE PERSONAL PROPERTY

Section 3 Liability for tax

Section 3. Every person storing, using or otherwise consuming in the commonwealth tangible personal property or services purchased from a vendor shall be liable for the tax imposed by this chapter. His liability shall not be extinguished until said tax has been paid to the commissioner, except that a receipt from a vendor engaged in business in the commonwealth or from a vendor who is authorized by the commissioner, under such regulations as the commissioner may prescribe, to collect the tax and who is, for the purposes of this chapter, regarded as a vendor engaged in business in the commonwealth, given to the purchaser pursuant to section four, shall be sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

96–8. Sales Nexus; Revocation of Technical Information Release 88–13

TIR 96–8 revokes TIR 88–13.

This Technical Information Release is being issued to revoke Technical Information Release 88–13, *Sales Nexus; Amendment of G.L. c. 64H, § 1(5)* (hereinafter "TIR 88–13"). TIR 88–13 was issued in response to St.1988, Chapter 202, §§ 19, 33, (Chapter 202), which amended the definition of "engaged in business in the commonwealth" in G.L. c. 64H, § 1(5). The Department hereby announces that TIR 88–13 is revoked and that the provisions of Section 19 of Chapter 202 will be enforced to the extent allowed under constitutional limitations. The relevant first sentence of the definition of "engaged in business in the commonwealth" is as follows:

> "Engaged in business in the commonwealth," having a business location in the commonwealth; regularly or systematically soliciting orders for the sale of services to be performed within the commonwealth or for the sale of tangible personal property for delivery to destinations in the commonwealth; otherwise exploiting the retail sales market in the commonwealth through any means whatsoever, including, but not limited to, salesmen, solicitors or representatives in the commonwealth, catalogs or other solicitation materials sent through the mails or otherwise, billboards, advertising or solicitations in newspapers, magazines, radio or television broadcasts, computer networks or in any other communications medium; or regularly engaged in the delivery of property or the performance of services in the commonwealth.

This Technical Information Release is effective prospectively as of the date below.

October 16, 1996 /s/ Mitchell Adams